

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1250-CR

Cir. Ct. No. 2007CF4886

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOVELL J. DAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO and REBECCA F. DALLET, Judges.
Affirmed.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Lovell J. Day appeals a judgment convicting him of one count of substantial battery and one count of second-degree sexual assault.

He also appeals an order denying his motion to modify his sentence.¹ Day argues: (1) that the circuit court relied on inaccurate information in sentencing him; and (2) that he is entitled to resentencing based on a psychological assessment done by the Wisconsin Resource Center. We affirm.

¶2 Day first argues that the circuit court relied on inaccurate information in sentencing him. Day contends that the circuit court incorrectly believed that he was being defiant at the sentencing hearing based on his withdrawn demeanor and refusal to speak, but that his affect was actually the result of his mental illness. In support, he points to a psychological assessment prepared at the Wisconsin Resource Center after sentencing that states that Day withdraws from social and emotional interaction as a coping mechanism for dealing with his paranoia.

¶3 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant seeking resentencing due to the circuit court’s use of inaccurate information must show by clear and convincing evidence that the information was inaccurate and the circuit court actually relied on the inaccurate information when imposing its sentence. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. “Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo.” *Tiepelman*, 291 Wis. 2d 179, ¶9.

¹ The Honorable Jean A. DiMotto imposed sentence and entered the judgment of conviction. The Honorable Rebecca F. Dallet denied the postconviction motion and entered the corresponding order.

¶4 Although cast as a claim that the circuit court relied on inaccurate information, Day does not argue that the circuit court relied on *inaccurate factual information*. The crux of his argument is that the circuit court drew *inaccurate inferences* about his character and capacity for rehabilitation based on how he acted at the sentencing hearing. We agree with the State that “a sentencing court’s analysis of a defendant’s demeanor is not the type of objective factual information contemplated by *Tiepelman* and other cases addressing a defendant’s constitutional right to be sentenced upon accurate information.” Moreover, the fact that Day’s mental illness may have played a role in his conduct at the sentencing hearing does not mean that the circuit court was incorrect in concluding that his attitude and refusal to speak at the hearing reflected poorly on his character and potential for rehabilitation, especially because the circuit court was aware of Day’s paranoia and cognitive limitations, and understood their effects on Day. We reject the argument that Day’s due process rights were violated by the circuit court’s assessment of Day’s attitude and demeanor at sentencing.

¶5 Day next argues that he is entitled to resentencing based on a “new factor.” A defendant is entitled to sentence modification if he or she shows the existence of a “‘new factor.’” *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A “new factor” is “‘a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.’” *Id.*, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law. *Id.*, ¶33.

¶6 Day contends that the Wisconsin Resource Center’s psychological assessment is a “new factor” because it shows that he has significant cognitive

deficits and he was given a new diagnosis for his mental illness. We reject this argument. Most of the information in the assessment was not *new* to the circuit court. The circuit court was aware of Day's cognitive deficits and his mental illness when it sentenced him, and it discussed his illness, and its impacts, at length during the sentencing hearing. Although Day's diagnosis was changed from paranoid schizophrenia to paranoid personality disorder because Day did not have documented delusions, the circuit court did not rely on Day's exact diagnosis or the extent of his delusions in framing its sentence. This minor post-sentencing change in diagnosis was therefore not highly relevant to imposition of Day's sentence. We conclude that the assessment is not a new factor entitling Day to sentence modification.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

